

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONALD E. TILDEN
Claimant

VS.

JC PENNEY CO., INC.
Self-Insured Respondent

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Docket No. 1,000,399

ORDER

Respondent requests review of the July 22, 2003 Supplemental Preliminary Order entered by Administrative Law Judge (ALJ) Robert H. Foerschler.

ISSUES

In his previous order dated July 11, 2003, the ALJ found that Dr. Reed was authorized to “diagnose and report his recommendation for any necessary treatment” regarding claimant’s shoulder complaints.¹ The ALJ then issued a Supplementary Preliminary Order which indicated he had been contacted by claimant’s attorney and advised the respondent’s carrier was refusing to pay for a MRI requested by Dr. Reed. Thus, the Supplemental Preliminary Order suggests that while no report from Dr. Reed had been filed with the Division, it was the ALJ’s opinion that if the MRI was part of the diagnostic process, “the carrier will be held to be liable for the charges.”²

The respondent requests review of whether the ALJ exceed his jurisdiction pursuant to K.S.A. 44-534a(a)(2) and 44-551(b)(2)(A) in issuing the Supplemental Preliminary Order on July 22, 2003.

Claimant argues the ALJ's Order should be affirmed.

¹ Preliminary Decision, (Jul. 11, 2003).

² Id.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Following a preliminary hearing held pursuant to K.S.A. 44-534a, the ALJ entered an Order which states as follows:

At a preliminary hearing on July 10, 2003 on Claimant's request for shoulder treatment, it appears that this was a part of the claim from its filing in 2001. Therefore Dr. Reed should be authorized to diagnose and report his recommendation for any necessary treatment of Claimant's present shoulder complaints. Since the Claimant is now working, any surgery should be delayed pending further consideration by the parties.³

This Order was not appealed by either party.

On July 21, 2003, a letter was written by claimant's counsel to the ALJ. This letter indicates respondent's carrier was refusing to authorize an MRI which Dr. Reed had scheduled. This letter was transmitted via fax and regular mail and a copy was sent to respondent's counsel.

On July 22, 2003, the ALJ issued a Supplemental Preliminary Order stating:

Attention has been given to a message from Claimant's attorney that authorization for an MRI of his shoulder and neck requested by Dr. Reed and now scheduled for July 28th in Kansas City has been refused by the carrier. Dr. Reed was authorized on July 10, 2003 to further examine, diagnose and report on Mr. Tilden's medical needs. No report from him about this or why someone in Boston is inquiring, has so far been received by this office. But if this is part of his activity as authorized before, the carrier will be held to be liable for the charges.⁴

Following the issuance of this order, respondent appealed alleging the ALJ exceeded his jurisdiction by issuing a supplemental order without the benefit of notice and a hearing pursuant to K.S.A. 44-534a. Respondent takes issue not only with the content of this order but also the process that brought about its issuance. It argues the letter by claimant's counsel and the subsequent inquiry as to the various individuals' names and addresses and/or health care providers was improper and likewise exceeded the ALJ's jurisdiction.

³ Preliminary Decision, (Jul. 11, 2003).

⁴ Supplemental Preliminary Order, (Jul. 22, 2003).

Claimant's counsel offers no real explanation for his actions other than to state that the July 21, 2003 letter was borne out of his "distress" that the MRI had not been approved in spite of the July 11, 2003 Preliminary Decision.

The Board finds that the ALJ's issuance of the July 22, 2003 Supplemental Preliminary Order exceeded his jurisdiction and should be vacated. Although the Board has, in the past, held that an ALJ retains continuing jurisdiction over preliminary hearing orders, that rule only holds true when the parties have notice of the specific issues to be addressed at the subsequent hearing.⁵ Implicit in that rule is the requirement that a second hearing be held pursuant to K.S.A. 44-534a.

In this instance, the original Order was issued July 11, 2003, and authorized Dr. Reed to "diagnose and report" regarding claimant's condition. There was no appeal following that Order. Thereafter, Dr. Reed apparently determined an MRI was required in order to "diagnose and report" on claimant's condition. For whatever reason, it would appear that respondent's carrier questioned this determination and expressed that concern directly to claimant's counsel on July 21, 2003.

The ALJ's July 22, 2003 Supplemental Preliminary Order was based upon information provided to him outside a hearing and without any opportunity for respondent to respond. It is likely the ALJ was simply trying to facilitate the orderly progression of the claim in response to claimant's attorney's letter. However, the law does not authorize this particular scenario.

Once claimant's counsel became aware respondent's carrier was indeed refusing to comply with the ALJ's July 11, 2003 Order, the appropriate course of action was to follow the process set forth in K.S.A. 44-512a. It is not effective nor proper to ask the ALJ to revisit the issue without a hearing. While the Board does not favor an insurance carrier's practice of second guessing the authorized treating physician's determination of the need for diagnostic procedures when there is an order in place, K.S.A. 44-512a is designed to address these issues.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the July 22, 2003 Supplemental Preliminary Order of Administrative Law Judge Robert H. Foerschler is vacated and set aside. This matter is remanded to the ALJ for further proceedings consistent with the Act.

IT IS SO ORDERED.

⁵ *McGee, Jr. v. Capital Electric Construction of Kansas, Inc.*, Nos. 206,931 & 210,664, 1997 WL 762991 (Kan. WCAB Nov. 26, 1997).

Dated this _____ day of September 2003.

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
John B. Rathmel, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director